

Business of 1995 was an extremely useful forum to identify key regulatory concerns of the community, and the Office of Advocacy continues to rely on the conference participants.

Most important, the latest amendments to the RFA will help ensure that the potential of the RFA is reached to its fullest extent. If you have comments, please contact the Office of Advocacy, U.S. Small Business Administration, 409 Third Street. S.W., Washington, D.C. 20416.

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## Overview

Prior to implementation of the Regulatory Flexibility Act (RFA) in 1980, small businesses and other small entities shouldered the same burden of federal regulations as their larger competitors, and with fewer resources.

For agencies that made good-faith efforts to comply with the RFA, there was a fundamental change in the federal bureaucracy's method of regulating small entities, defined in the act as small businesses, small governmental jurisdictions and small not-for-profit organizations. It amended the Administrative Procedure Act to ensure that regulators examine not just any alternative but those designed to reduce burdens or enhance benefits to small entities.

Under the RFA, each agency must analyze how its regulations affect the ability of small entities to invent, to produce and to compete. Agencies are supposed to balance the burdens imposed by regulations against their benefits and propose alternatives to those regulations that create economic disparities between different-sized entities.

The RFA, an outline for responsible, deliberate rulemaking, establishes a procedure for looking at the effects of rules on small entities. Regulated small entities are encouraged to participate in the development and consideration of alternate means of achieving regulatory objectives. Federal agencies must consider establishing different compliance or reporting requirements, timetables, or exemptions to take into account the resources available to small entities.

The 1996 amendments update the requirements for a final regulatory flexibility analyses—including a description of the steps an agency must take to minimize the significant economic impact on small entities. In addition, whenever a small business feels adversely affected or aggrieved by an agency rulemaking because of the agency's failure to comply with the RFA, the small business may seek review of the agency's RFA compliance in court. Finally, the requirements of the RFA now extend to Internal Revenue Service interpretative rulemakings, previously exempt under the provisions of the Administrative Procedure Act.

The chief counsel for advocacy of the U.S. Small Business Administration has been designated to monitor agency compliance with the RFA, and possesses authority to intervene as an *amicus curiae* in court proceedings involving compliance with the RFA.

## **Legislative History**

Prior to passage of the RFA in 1980, both houses of Congress built a conclusive record of disillusionment and discontent among the regulated small business community in a number of hearings over a period of 10 years. Small businesses and other small entities repeatedly claimed that uniform application of undifferentiated rules to them and to larger entities produced disproportionate adverse economic hardship.

The Senate and House Small Business and Judiciary Committees heard reports from small businesses, small cities and towns, and small non-profit institutions about the damaging impact of regulatory policy. Evidence indicated that uniform application of federal regulatory requirements imposed increases in the economies of scale and affected small entities' ability to compete effectively. Reports on the bills of both houses of Congress cited these disproportionate economic burdens on small business as contributing to declines in productivity, competition, innovation and the relative market shares of small business.

The Senate passed the RFA, adding Chapter VI to the Administrative Procedure Act on August 6, 1980. The Judiciary Committee's report on the original bill read as follows: "The Committee believes that meaningful regulatory reform must be government-wide, enforceable, and coordinated with the legislative framework for the agencies...." The report went on to say, "The APA is the fundamental legislation upon which federal rulemaking is based, and, together with the case law that has grown up around it, provides a foundation for nearly all significant agency actions. This is where regulatory reform must be focused."<sup>1</sup>

The House passed the measure on September 9, 1980. The bill was signed into law on September 19, 1980, with most of the provisions taking effect January 1, 1981.

The RFA is a relatively short statute. Yet despite its brevity, numerous difficulties arose in the interpretation and implementation of the act. Some of these problems are related to the specific language of the statute; others are the result of agency indifference to the mandate in the RFA. In either case, the history of implementation of the RFA has been somewhat troubled and inconsistent. Since its passage, numerous attempts have been made to amend or reinforce the RFA.

On September 30, 1993, President Clinton signed Executive Order (E.O.) 12866, which, among other things, reinforced the RFA. To ensure that the agencies' regulatory programs were consistent with the philosophy of weighing the costs and benefits of available regulatory alternatives, E.O. 12866 required agencies to abide by a number of principles. A partial list follows:

- 1) Each agency shall identify and assess available alternatives to direct regulation;
- 2) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective;

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<sup>1</sup> Senate Report No. 96-878, 10.

3) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; and

4) The Office of Management and Budget may require a more extensive and detailed analysis for a rule if it affects a sector of the economy, including one predominantly made up of small businesses.

Bills introduced in the 101st and 102nd Congress attempted to address RFA issues, but died in committee. Legislation was also introduced in the 103rd Congress proposing amendments to, among other things, amend the judicial review provisions of the RFA. The judicial review provisions were added by the Senate to the House-passed version of H.R. 820, the National Competitiveness Act of 1993,. The bill did not pass.

In addition, in 1993 the Clinton administration's National Performance Review (NPR) recommended that agency compliance with the RFA be subject to judicial review. The NPR task force also recommended that the Office of Advocacy be authorized to draft government-wide guidance on compliance with the RFA.

In 1996, the Congress passed the Small Business Regulatory Enforcement Fairness Act, expanding judicial review to the RFA and promoting increased understanding of and voluntary compliance with federal regulations by small entities. On June 6, 1995, the Senate bill, S. 942, was referred to the Senate Committee on Small Business. Hearings followed on February 28, 1996. In a remarkable flurry of legislative support, and citing the efforts of the White House Conference on Small Business, the Senate passed S. 942 with a unanimous vote (100-0) on March 15, 1996. Early in the 104th Congress, the House of Representatives passed the amendment to the RFA for judicial review in omnibus legislation, but the Senate provisions were eventually adopted. On March 26, 1996, S. 942 was incorporated into H.R. 3136, the Contract with America Advancement Act, as the Hyde Amendment. On March 28, 1996, the bill was passed by the Senate by unanimous consent; and on March 29, 1996, the Public Law 104-121 was signed by President Clinton.

The RFA amendments permit judicial review of agencies' compliance with the RFA, update the requirements for a final regulatory flexibility analysis, and expand small business review of rulemaking by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA).

Whenever a small business believes it is adversely affected or aggrieved by an agency rulemaking because of the agency's failure to comply with the RFA, the small business now may seek review of the rule in court. The court may review the final regulatory flexibility analysis, the agency's certification that the rule has no impact on small entities, and the agency's compliance with periodic reviews of current rules. Under the amendment, judicial review also applies to interpretative rulemakings promulgated by the IRS.

The new law broadens the authority of the chief counsel for advocacy of the U.S. Small Business Administration to file *amicus curiae* briefs on cases under judicial review.

In addition to amending the RFA, the new law amends the Equal Access to Justice

Act, provides for a complaint process whereby small entities may register complaints against aggressive enforcement officials, incorporates President Clinton's directives on reasonable penalty policies, and requires agencies to supply compliance guides for all new rules with significant small business impacts.

## **The Act**

The Regulatory Flexibility Act establishes that agencies shall endeavor to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to regulation. Under the law, federal agencies are required to determine whether a regulation has a significant economic impact on a substantial number of small entities. Agencies also are required to consider flexible regulatory alternatives for small entities and assure that such proposals are given serious consideration.

### **Coverage**

The RFA applies to every federal rule that requires public comment under the Administrative Procedure Act, Section 553, or any other provision of law. The 1996 amendment extends this coverage to interpretative rulemakings by the Internal Revenue Service.

The "small entities" intended to benefit from the act include three types:

- 1) Small businesses. The term "small business concerns" is defined in Section 3 of the Small Business Act. The Small Business Administration's general size standard definitions are located in Title 13 of the *Code of Federal Regulations*, Section 121. Where SBA's size standards do not appropriately reflect the effects of a specific regulatory proposal, agencies may develop more relevant size determinants for rulemaking after consultation with the Office of Advocacy. If a size standard is used in a rulemaking, the standard must also be approved by the SBA Administrator (15 U.S.C. 632(a)(2)).
- 2) Small organizations. Any nonprofit enterprise that is independently owned and operated and is not dominant in its field is covered.
- 3) Small governmental jurisdictions. Governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 are covered.

### **Increased Small Business Participation**

The RFA marks a recognition that federal agencies, in order to develop awareness of their rulemaking activities by small entities, must make greater outreach efforts. With the 1996 amendments, the act now requires the Occupational Safety and Health Administration and the Environmental Protection Agency to formally collect information from small business representatives for regulation development.

In rulemaking, all agencies are required to take some or all of the following steps in order to solicit input from small entities:

- Publish a semiannual regulatory agenda;
- Provide notice of rulemakings expected to affect small entities;
- Publish proposed rules in the *Federal Register*;
- Provide a description of the impact a proposed rule is expected to have on small entities as determined in initial analysis;
- Publish notice of proposed rules in publications likely to be obtained by small entities, such as industry publications or trade association newsletters;
- Send direct notification of proposed rules to interested small entities or their representatives;
- Conduct public forums on proposed rules to solicit comments using public meetings or computer networks.

Small entities should participate in these processes. By interacting, both small entities and agencies have an opportunity to fully examine the implications and alternatives of regulatory actions. Small business participation in the process both ensures that agencies have complete information and enhances the ability of small entities to challenge an agency action in court.

Under Section 609(b) of the amended act, OSHA and EPA are required to convene small business advocacy review panels for each rulemaking that will have a significant economic impact on a substantial number of small entities. The act provides for a formal process of collecting information from small entities; the representatives of small entities likely to be affected will be identified by the chief counsel for advocacy before a proposed rule is published. Input will be sought on the number and type of entities affected, the projected cost of compliance and possible alternatives to the draft regulation. Following this process, the interagency review panel, including employees of the agency, the Office of Management and Budget's Office of Information and Regulatory Affairs and the SBA's Office of Advocacy, will prepare a report for the agency on the potential impact on small entities.

### **Semiannual Agency Agendas**

In April and October of each year, federal agencies are required to publish a regulatory agenda listing all proposed or final rules expected to be published in the *Federal Register* during the following year. Rules to be included in the agenda are those likely to have a "significant economic impact on a substantial number of small entities." Publication of the agendas lengthens the amount of time the small entities have to react to those proposals and rules.

## **Periodic Review**

The RFA requires agencies to review all existing regulations to determine if they have a significant economic impact on a substantial number of small entities. Those rules that have an impact are reviewed to determine if the regulation should be continued without change, revised or rescinded to minimize any significant economic impact. Review of all agency rules within 10 years of adoption or the 1980 enactment date, whichever is later, is required. Agencies are required to have a plan for the periodic review of rules.

Agencies are required annually to publish in the *Federal Register* their intent to perform a periodic review of a given list of rules in the succeeding 12 months. The agency must invite public comment. Agency periodic reviews must evaluate:

- The continued need for the rule;
- The nature of complaints or comments from the public received during the rule's enforcement;
- The complexity of the rule;
- The extent to which the rule overlaps, duplicates or conflicts with other federal rules and to the extent possible, with state and local government rules;
- The length of time since the rule was evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

## **Judicial Review**

The 1996 amendments permit judicial review of agencies' compliance with the RFA. Whenever a small business is adversely affected or aggrieved by an agency rulemaking as a result of the agency's failure to comply with the act, the small business may seek review of the rule or the agency's RFA compliance in court.

The chief counsel for advocacy has been designated to monitor agency compliance with the RFA and has the authority to intervene as an *amicus curiae* in court proceedings involving compliance with the RFA. The court may review any claims of noncompliance by the agency with respect to:

- Final regulatory flexibility analysis, including the agency's outreach to collect input from small entities;
- Certification by the head of an agency that the rule will not, if promulgated, have a significant impact on small entities;
- Periodic review of rules.



## Regulatory Analysis

### *Initial Regulatory Flexibility Analysis*

The RFA requires federal agencies to consider the impact of regulations on small entities in developing the proposed and final regulations. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. The initial regulatory flexibility analysis or a summary of it must be published in the *Federal Register* with the proposed rule.

An initial regulatory flexibility analysis is prepared in order to ensure that the agency has considered all reasonable regulatory alternatives that would minimize the rule's economic burdens or increase its benefits for the affected small entities, while achieving the objectives of the rule or statute. The analysis describes the objectives of the proposed rule, addresses its direct and indirect effects and explains why the agency chose the regulatory approach described in the proposal over the alternatives.

Under Section 603(b) of the RFA, each initial regulatory flexibility analysis is required to address: (1) reasons why the agency is considering the action, (2) the objectives and legal basis for the proposed rule, (3) the kind and number of small entities to which the proposed rule will apply; (4) the projected reporting, recordkeeping and other compliance requirements of the proposed rule, and (5) all federal rules that may duplicate, overlap or conflict with the proposed rule.

While these five factors are necessary elements to an adequate IRFA, they are not the sole factors necessary to perform an adequate analysis. Most important, section 603(c) requires that each initial regulatory flexibility analysis contain a description of any significant alternatives to the proposal that accomplish the statutory objectives and minimize the significant economic impact of the proposal on small entities. These alternatives could include the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; the use of performance rather than design standards; or an exemption from coverage of the rule or any part of the rule for small entities.

Although agencies often overlook this possibility, regulatory flexibility alternatives may include less stringent requirements for all regulated entities or for different classes of regulated entities. The section 603(c) analysis, a key part of the regulatory flexibility analysis, informs the decisionmaker of the pros and cons of each alternative, so he or she can make informed regulatory decisions.

The steps necessary under 603(b) include:

- 1) **A description of the reasons why action by the agency is being considered.** This is currently included in the preamble to all proposed regulations.
- 2) **A succinct statement of the objectives and legal basis for the proposed rule.** This is currently included with proposed rules.

**3) A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.** The agency describes the industry or economic sector in total and its small and large entity segments, includes a description of the industry or sector at the time of proposal, and explains any existing dynamics, such as trends in employment or birth of entities.

The definition of a small entity is an important element of this analysis. Agencies may either use the statutory definition of small entity or may propose an alternate definition in consultation with the SBA Office of Advocacy. The statutory small business definitions vary by 4-digit SIC code and are found at 13 CFR Part 121, last repromulgated in the January 31, 1996, *Federal Register*.

In the analysis, "small" entities may be further divided into multiple classes of small businesses, for example, 0-9, 10-49 and 50-500 employees. This segmentation allows the agency to differentiate different types of effects on different-sized small entities, which might lead to a different approach being applied to the very smallest entities.

The agency must include a description of the industries and economic sectors—as identified by, for example, their four-digit Standard Industrial Classification Codes—that directly or indirectly would be affected by the proposed regulation.

**4) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule.** The description should include an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. This cost analysis should describe each item and estimate the costs, comparing large and small entities. It should distinguish the initial costs from recurring or operating costs. This information normally should be available in large part from the paperwork burden analysis prepared under the requirements of the Paperwork Reduction Act.

**5) An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.** This should include information for regulated entities on other rules governing the same activities.

#### *Certification: When a Full Analysis is Not Required*

If a proposed rule is not expected to have a significant economic impact on a substantial number of small entities, either adversely or beneficially, the agency is not required to perform an initial regulatory flexibility analysis. In these instances, the RFA authorizes an agency head to certify a rulemaking. To perform an adequate certification, an agency must undertake a threshold analysis to determine the economic impact of a proposed rule on small entities. Once this preliminary analysis is undertaken, an agency then can determine whether to certify or undertake a complete initial regulatory flexibility analysis.

The certification of a finding of no significant impact on a substantial number of entities must be published with the proposed rule in the *Federal Register*. The notice must be

accompanied by an explanation of the factual basis for the certification. Under the 1996 amendments, the certification is subject to judicial review if the final rule is challenged.

There is currently no case law that identifies the "trigger" levels of "significant economic impact," or "substantial number of small entities." However, because the purpose of the analysis is to aid the decisionmaker in resolving regulatory issues affecting small entities, it is the opinion of the Office of Advocacy that any rulemaking that generates the interest of a significant number of small entities warrants the application of the RFA's analysis tools.

### *Final Regulatory Flexibility Analysis*

When an agency issues any final rule, it must prepare a final regulatory flexibility analysis or certify that the rule will not have a significant economic impact on a substantial number of small entities. The final regulatory flexibility analysis must discuss the comments received, the alternatives considered and the rationale for the final rule. Either the summary or the final regulatory flexibility analysis itself must be published in the *Federal Register* with the final rule. Under the 1996 amendments, the final regulatory flexibility analysis is subject to judicial review if the final rule is challenged.

The new law amends the requirements of the final regulatory flexibility analysis contained in the original 1980 legislation. Each final regulatory flexibility analysis must contain the following:

- 1) A succinct statement of the need for and objectives of the rule;
- 2) A summary of the significant issues raised by public comments in response to the initial regulatory flexibility analysis, a summary of the agency's assessment of such issues and a statement of any changes made in the proposed rule as a result of such comments;
- 3) A description and an estimate of the number of small businesses to which the rule will apply or an explanation of why no such estimate is available;
- 4) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record; and
- 5) A description of the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting each of the other significant alternatives.

Again, the most important section is the analysis of the relative merits and demerits of the alternatives and the rationale for the final agency action. An agency may not simply rely on its preamble to the final rule to comply with the requirements for a final regulatory flexibility analysis. The RFA requires specific discussion of small entity alternatives designed to reduce adverse impacts or enhance the beneficial impacts of a rulemaking.

The RFA amendments modify the Administrative Procedure Act requirements by turning the consideration of small entity issues into a major component in rulemaking. Failure to fully comply with these requirements could result in arbitrary and capricious rulemaking.

The Office of the Chief Counsel for Advocacy believes that although agencies may not be legally required to perform an initial or final regulatory flexibility analysis on every rulemaking, agencies should aspire to perform these analyses for every rule that would have an economic impact on small entities. The act generally provides that agencies must prepare both an initial and final regulatory flexibility analysis for rules that may have a "significant economic impact on a substantial number of small entities." In practice, this requires agencies to prepare an analysis whenever a rule's impact on small entities cannot be described as *de minimis*. This practice will move away from speculative analysis towards more fact-based decisionmaking within the spirit of the law. We believe that an agency's resources should be shifted from the effort to determine whether regulatory flexibility analysis is required to the more productive consideration of regulatory options for small entities subject to the rule.

## Appendix A. Small Business Statistics

One of the most difficult tasks in preparing either an initial or final regulatory flexibility analysis is locating statistics on small business. The information in this appendix has been furnished to assist with development and review of initial and final regulatory analyses.

There were an estimated 22.1 million business tax returns filed in 1994. Of these, 68.3 percent were sole proprietorships, 20.6 percent were corporations and 11.1 percent were partnerships. By most size standards issued by the U.S. Small Business Administration, about 99.7 percent of all firms are small and have fewer than 500 employees and less than \$25 million in sales or assets.

About 23 percent of the tax returns filed are filed by about 5.1 million employers; the remainder represent the full- and part-time self-employed.

Ideally, data used to analyze the cost and benefit of government regulations should be data for individual firms—termed microdata. However, virtually all publicly available data is confidential by law—meaning that individual names and addresses cannot be disclosed. Therefore, most government agencies that collect data release summary information on groups of firms by industry, size or location.

The data sources available and listed below generally cover statistics on industries' employment, payroll and receipts. Most available data bases do not cover financial data—the balance sheet and income statement information that is needed to analyze the cost of regulations. This is the most sensitive type of information and is rarely available even in aggregate form; profit information is usually unavailable.

While Census data will always lag behind the calendar three to four years, new data on firm dynamics—especially births and deaths—is becoming more readily available from the private sector, especially in cooperation with Wells Fargo Bank, the National Federation of Independent Business and the Gallop Organization.

A listing of data sources is provided in the SBA's *Catalog of Small Business Research*, order no. PR-861 (Springfield, Va.: National Technical Information Services, 1995). NTIS can be reached at (703) 487-4650.

The sections following provide term definitions used in data collection and summarize the data currently available.

### Definitions of Small Business Entities

**Establishments.** An establishment is the smallest unit in which business activity is conducted and on which statistical information is collected. The establishment concept makes no reference to either ownership or taxpaying status. Furthermore, establishments may be branches of larger firms and differ from separately owned and operated businesses of similar size in purchasing power, advertising coverage, management and control systems, technical resources, and access to capital and credit. Most very small businesses are single establishments.

*Enterprises.* The enterprise concept refers to all establishments owned by a "parent" company. For instance, an enterprise may own subsidiaries, branches and unrelated establishments. In most instances, it is necessary to use the enterprise concept to study the characteristics of small firms since the ownership issue is critical for assessing the impact of a given policy. About 15 percent of total employment is in small establishments (fewer than 100 employees) owned by larger firms (more than 100 employees). There are 5.1 million enterprises in the SBA Small Business Data Base and 6.3 million establishments.

*Taxpaying Units.* The concept of taxpaying unit refers to the legal organization of a business as a sole proprietorship, partnership, or corporation. Generally, tax data make no precise distinction between establishments and enterprises. This makes comparisons across data sources difficult, particularly for large multi-establishment firms, which can file taxes as either enterprises, branches (subsidiaries) of a parent enterprise, or consolidated corporations.

### **SBA's Census-Based Small Business Data Base**

Beginning in late 1991, the Office of Advocacy of the SBA contracted with the Economic Surveys Division (ESD) of the Bureau of the Census to produce linked longitudinal data files on an enterprise basis. The data base is an extension of Census' Enterprise Statistics program. The data base includes information from 5.1 million enterprises and 6.3 million establishments.

Some of the data have already been published in a number of sources, including *The State of Small Business: A Report of the President*, publication no. 045-000-00273-0 (Washington, D.C.: U.S. Government Printing Office, 1994). Other tables from this new data base are published in *The Handbook of Small Business Data: 1994*, publication no. 045-000-00270-5 (Washington, D.C.: U.S. Government Printing Office, 1994). The U.S. Government Printing Office may be reached at (202) 512-1800.

The SBA Office of Advocacy data files generally include the number of establishments, firms, payroll per firm, payroll per employee, receipts per firm and receipts per employee for five major size classes: firms with fewer than 20 employees and those with 20-99, 100-499 and 500 or more employees. The data are broken out by location and/or industry. For an example, see the table on page 19.

Cross-sectional files of the raw data were produced for 1988, 1989, 1990, 1991 and 1992, and 1993 data are expected to be added. The files are available in hard copy in looseleaf notebooks, on reproducible floppy disks and in Lotus files on SBA's computers. Data are generally available at the four-digit level of industrial detail for the United States and at the two-digit level for individual states.

Customized tabulations or copies of the data base are available. However, cost and/or delays can be expected because of recent budget restrictions. Inquiries may be directed to Mr. Ken Sausman, Chief, Research Programming Branch, Bureau of the Census at (301) 457-25628 or Dr. William Whiston, Chief, Research Contracts Branch, Office of Advocacy, (202) 205-6530. No individual names or addresses may be provided from the data base; these are confidential by law.

### *Minority- and Women-Owned Firms*

Regular Census data for minority- and women-owned businesses are not yet available. The Bureau of the Census will eventually link data for minority- and women-owned businesses (those with employees only) to the cross-sectional files for 1992.

The new Census Bureau annual survey of women-owned businesses will eventually be incorporated into the SBA data tabulations for firms with employees. It should be noted that about 85 percent of women- and minority-owned firms have no employees and that only the about 15 percent of firms with employees will be part of this data base.

### *Job Creation*

Census files now available for the 1989-1991 and 1990-1992 periods are the first U.S. government data files from which job creation can be studied for all industries.

### **Studies of Small Firm Financing**

#### *Federal Reserve Survey of Small Business Finances*

Within the last five years, two major surveys of small firm finances have been conducted by the Federal Reserve Board and the U.S. Small Business Administration. The National Surveys of Small Business Finances (NSSBF) have been the most detailed examination to date of the credit needs of small firms, as well as their sources and uses of funds. In each survey, more than 5,000 small firms with fewer than 500 employees each provided detailed answers on their uses of banks and bank services and alternative sources of credit, their difficulties encountered in borrowing or raising expansion capital, and their level of satisfaction with each type of service. (Because of data limitations, firms without employees were not included in the two surveys.)

Some of the highlights of the two NSSBF surveys included:

- Only 1 in 20 small firms with employees reported using funds from a mortgage for business purposes: this finding was somewhat surprising. The survey excluded very new home-based firms;
- Lines of credit were reported in use by about 55 percent of male-owned firms and 50 percent of female-owned firms (1994 survey);
- Trade credit was used by 61 percent of small firms; 4 in 10 small businesses used personal credit cards for business purposes.

### *Federal Reserve Survey of Consumer Finances*

Several times during the past 15 years, the SBA has analyzed the household asset information for those sections of the Consumer Finance Survey (CFS) pertaining to business startup or ownership. In general, the survey data indicate those percentages of a household's assets that may be considered part of the business, either directly and indirectly.

The CFS was replicated by the Federal Reserve Board in 1995. Preliminary tabulations should be available in the form of summary files during 1996.

### *Census Characteristics of Business Owners*

For the year 1987 and again for the 1992/1994 period, the Bureau of the Census, under contract with the Minority Business Development Agency of the U.S. Department of Commerce and the SBA's Office of Advocacy, produced the Characteristics of Business Owners (CBO) data. The CBO is a survey of 125,000 small firms—roughly divided equally into African-American, Hispanic, Asian-American, women-owned and nonminority male-owned firms. To be included in the CBO sampling frame, firms needed \$5,000 in sales in each respective year and had to have filed a tax return.

The CBO is the only nationally representative source of data for many of the variables it covers. The CBO includes data on the demographic characteristics of the owner, such as age, gender and years of prior experience, and on the characteristics of the firm itself, such as sales, export status, franchise status, hours and weeks worked by the business owner, sources of debt and equity capital and whether the firm is home-based.

The 1992/1994 version of the CBO is expected to be available in 1996.

### *Internal Revenue Service Statistics of Income*

Each quarter, the Statistics of Income Division of the Internal Revenue Service (IRS) publishes the *SOI Bulletin*. This publication contains data for both households and businesses, and it is an invaluable source of historical information. Data on business firms is generally provided by receipt size class for proprietorships, partnerships and corporations.

Information on business profits from IRS is elusive. For sole proprietors and partnerships, only data on net income are available. Statistics on the preferred variables—return on assets or return on investment—are not obtainable directly from the tax return; they may be found only in balance-sheet information.

For small business corporations, data are more readily available. The IRS' *Source Book for Corporations* contains data for corporations by asset size class. Balance sheet and income statement information is available for corporations in about 15 different asset classes. From these detailed data, it is possible to calculate rates of return on assets as well as the profits of small business (generally subchapter S) corporations.



## **Data on Self-Employed Persons**

Each year, the March Current Population Survey (CPS) of the Bureau of the Census asks a series of expanded questions about self-employed persons as part of its firm size supplement. These questions include the hours and weeks spent working in the business during the previous year, the income earned, the demographics of the business owner, whether the firm (owner) has or provides benefits and several related questions about the industry of the firm.

## **Private Data Sources**

The Kauffman-Ernst & Young Data Base of Fast Growth Companies (KEYFGC) is a promising new data base that relies on data from two sources: the accounting firm of Ernst and Young (for employment and sales information) and the Dun and Bradstreet Corporation (for financial data). Four years of information are currently available on each firm, including income statement and balance sheet information.

The major promise of this data base is the ability to understand where and how fast growing companies develop over time—including their detailed locations and industries. In addition, the KEYFGC data set is one of the only data bases with actual financial data available on individual (but unidentified) companies.

# Table: Employment and Payroll of Businesses

US ESTABLISHMENTS, EMPLOYMENT, AND PAYROLL BY INDUSTRY AND FIRM SIZE - 1992

FIRM SIZE BY EMPLOYMENT

ITEM	TOTAL	0	1-4	5-9	10-19	20	20-99	100-499	500	500+
<b>TOTAL - ALL INDUSTRIES</b>										
Firms	5,095,356	644,453	2,430,827	945,802	551,912	4,572,994	439,084	69,156	5,081,234	14,122
Establishments	5,319,300	546,065	2,435,200	954,863	508,276	4,653,464	534,713	283,719	5,571,895	747,404
Employment	92,825,797	0	5,178,909	5,202,861	7,390,874	18,772,644	17,121,010	13,307,187	49,200,841	43,624,856
Payroll (\$000)	2,272,392,408	21,432,778	103,159,663	122,381,613	152,830,640	399,804,694	358,969,129	298,174,483	1,066,948,306	1,205,444,102
Receipts (\$000)	13,605,183,510	110,778,665	709,960,752	725,146,922	859,446,404	2,385,332,743	2,292,331,108	1,717,767,820	6,395,451,671	1,209,731,839
<b>TOTAL - AGRICULTURAL SERVICES, FORESTRY, FISHING</b>										
Firms	96,211	19,950	44,646	17,485	9,272	91,553	4,168	360	96,081	130
Establishments	97,548	19,950	44,851	17,502	9,303	91,606	4,332	561	96,499	1,049
Employment	593,611	0	95,557	114,959	121,169	331,705	(m)	(k)	523,471	70,340
Payroll (\$000)	10,049,561	379,584	1,494,381	1,740,516	1,953,872	5,568,353	(D)	(D)	8,685,639	1,363,922
Receipts (\$000)	31,010,644	1,219,222	4,837,940	4,859,763	5,173,392	16,090,317	(D)	(D)	25,512,766	5,497,676
<b>ALL MINING, SIC 10, 12, 13, 14</b>										
Firms	22,953	2,347	10,685	3,678	2,651	19,361	2,612	571	22,544	409
Establishments	29,224	2,358	10,719	3,720	2,765	19,582	3,170	1,673	24,405	4,819
Employment	650,241	0	21,908	24,187	35,809	81,904	96,266	79,548	257,718	392,523
Payroll (\$000)	25,594,083	118,390	516,440	581,140	905,390	2,121,360	2,799,566	2,795,514	7,716,440	17,877,643
Receipts (\$000)	159,505,011	705,880	4,936,287	4,957,475	5,572,525	16,172,167	17,263,294	14,855,965	48,291,416	11,213,595
<b>ALL CONSTRUCTION, SIC 15, 16, 17</b>										
Firms	584,453	93,428	288,327	103,810	56,935	542,500	37,686	3,624	583,810	643
Establishments	590,627	93,433	288,346	103,877	57,074	542,732	38,703	5,065	586,500	4,127
Employment	4,501,728	0	605,642	678,529	756,452	2,040,623	1,375,540	570,433	3,986,596	515,132
Payroll (\$000)	122,174,048	2,576,388	12,287,454	14,339,387	18,169,727	47,372,956	38,318,400	18,348,677	104,040,233	18,133,815
Receipts (\$000)	563,284,064	12,602,810	73,527,891	57,662,329	79,292,673	233,085,703	167,555,978	83,444,606	484,086,287	79,197,777
<b>ALL MANUFACTURING, SIC 20-39</b>										
Firms	328,201	28,231	101,139	61,180	52,104	242,654	64,721	16,246	323,621	4,580
Establishments	387,616	28,249	101,176	61,260	52,442	243,127	69,662	28,404	341,193	46,423
Employment	18,166,798	0	230,718	409,880	710,680	1,351,278	2,660,225	2,935,309	6,946,812	11,219,886
Payroll (\$000)	563,235,341	1,717,335	4,611,434	8,572,966	16,430,460	31,332,195	66,485,966	76,310,840	174,128,631	389,106,710
Receipts (\$000)	3,083,094,966	9,071,004	23,298,285	38,364,690	70,218,135	140,952,114	306,592,766	411,557,978	861,102,858	2,221,992,108
<b>TRANSPORTATION, COMMUNICATIONS, &amp; UTILITIES, SIC 40-49</b>										
Firms	184,889	23,735	84,552	31,396	20,760	160,443	19,250	3,591	183,284	1,805
Establishments	259,176	23,783	84,707	31,978	22,536	163,002	26,827	13,775	203,604	55,572
Employment	5,520,912	0	178,074	205,642	278,656	662,372	733,189	561,634	1,957,195	3,583,717
Payroll (\$000)	175,532,266	804,677	3,234,154	3,901,076	5,600,708	13,540,815	16,731,250	14,855,564	45,127,629	130,404,637
Receipts (\$000)	933,516,197	3,275,208	19,007,901	17,479,227	23,281,050	63,043,396	70,061,691	66,928,053	200,033,140	733,483,057
<b>WHOLESALE TRADE, SIC 50 - 51</b>										
Firms	380,328	36,720	160,821	75,451	52,454	325,446	43,986	7,788	377,220	3,108
Establishments	493,298	36,794	161,307	77,631	58,659	334,391	69,135	28,300	431,626	61,472
Employment	6,095,217	0	350,012	498,798	698,814	1,547,624	1,572,622	944,727	4,064,973	2,030,244
Payroll (\$000)	190,880,997	1,411,041	9,249,473	12,898,206	18,921,625	42,480,345	44,351,284	27,808,120	114,639,749	76,241,248
Receipts (\$000)	1,222,844,037	25,546,596	214,025,695	232,914,044	302,672,286	775,158,621	819,876,657	478,426,252	2,073,461,530	1,49,382,507
<b>RETAIL TRADE, SIC 52-59</b>										
Firms	1,089,071	125,196	468,742	226,503	141,663	982,104	111,575	12,511	1,086,190	2,881
Establishments	1,567,940	125,673	470,618	232,565	160,649	986,705	172,355	83,760	1,245,820	322,120
Employment	19,681,419	0	1,056,803	1,493,283	1,884,434	4,434,500	4,133,043	2,061,991	10,629,534	9,051,885
Payroll (\$000)	258,722,421	2,962,391	12,087,262	17,104,408	22,028,778	54,182,839	54,771,981	28,095,759	137,050,579	121,671,842
Receipts (\$000)	1,973,605,216	20,288,976	122,899,866	141,045,641	169,821,334	454,055,617	452,217,141	220,132,614	1,126,405,572	547,200,644
<b>FINANCE, INSURANCE, &amp; REAL ESTATE, SIC 60 - 69</b>										
Firms	411,466	49,340	244,664	55,783	28,069	377,856	24,607	5,930	408,393	3,073
Establishments	598,166	49,414	245,317	58,058	34,537	387,326	49,768	32,055	499,149	129,017
Employment	6,904,478	0	473,761	359,205	370,442	1,203,408	927,551	532,107	2,963,066	3,941,412
Payroll (\$000)	221,042,316	1,878,983	9,703,686	8,861,944	10,072,514	30,517,107	25,918,536	24,844,874	81,290,517	139,761,799
Receipts (\$000)	1,827,343,079	9,345,548	69,631,330	45,283,702	50,833,394	175,293,974	151,956,016	179,027,418	506,277,410	1,221,065,669
<b>SERVICES, SIC 70-99</b>										
Firms	1,963,563	207,905	1,016,325	370,129	190,564	1,784,923	141,871	29,047	1,955,841	7,722
Establishments	2,224,339	208,564	1,018,051	376,613	207,683	1,810,911	200,503	90,120	2,101,534	122,805
Employment	30,665,625	0	2,147,689	2,407,555	2,526,265	7,061,689	5,472,349	5,271,870	17,825,908	12,839,717
Payroll (\$000)	703,826,217	8,635,729	49,811,526	54,301,767	58,686,195	171,435,217	117,258,567	104,249,947	392,943,731	310,682,486
Receipts (\$000)	1,803,243,602	23,349,642	176,526,187	152,101,032	152,233,257	504,210,118	298,095,244	260,239,636	1,062,544,996	740,696,604

Source: U.S. Small Business Administration, Office of Advocacy, based upon data prepared under contract by the Bureau of the Census.

Explanation of letter codes: (D) = Data withheld to avoid disclosing data for individual companies.  
(k) & (m) = entered in place of employment data representing employment-size classes 25,000 to 49,999 and 100,000 or more, respectively.

## Appendix B

94 STAT. 1164

PUBLIC LAW 96-354—SEPT. 19, 1980

### Public Law 96-354 96th Congress

#### An Act

Sept. 19, 1980  
[S. 299]

To amend title 5, United States Code, to improve Federal rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small entities, and for other purposes.

Regulatory  
Flexibility Act.  
5 USC 601 note.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Flexibility Act".*

#### FINDINGS AND PURPOSES

5 USC 601 note.

#### SEC. 2. (a) The Congress finds and declares that—

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

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94 STAT. 1165

(b) It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

#### ANALYSIS OF REGULATORY FUNCTIONS

SEC. 3. (a) Title 5, United States Code, is amended by adding immediately after chapter 5 the following new chapter:

#### "CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

- "Sec. 601. Definitions.
- "Sec. 602. Regulatory agenda.
- "Sec. 603. Initial regulatory flexibility analysis.
- "Sec. 604. Final regulatory flexibility analysis.
- "Sec. 605. Avoidance of duplicative or unnecessary analyses.
- "Sec. 606. Effect on other law.
- "Sec. 607. Preparation of analyses.
- "Sec. 608. Procedure for waiver or delay of completion.
- "Sec. 609. Procedures for gathering comments.
- "Sec. 610. Periodic review of rules.
- "Sec. 611. Judicial review.
- "Sec. 612. Reports and intervention rights.

#### "§ 601. Definitions

"For purposes of this chapter—

"(1) the term 'agency' means an agency as defined in section 551(1) of this title;

"(2) the term 'rule' means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term 'rule' does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

"(3) the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

"(4) the term 'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

Appendix B. The Regulatory Flexibility Act of 1980

5 USC 601.

5 USC 551.

5 USC 553.

15 USC 632.

"(5) the term 'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register; and

"(6) the term 'small entity' shall have the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction' defined in paragraphs (3), (4) and (5) of this section.

5 USC 602.

**"§ 602. Regulatory agenda**

Publication in  
Federal  
Register.

"(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

"(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

"(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and

"(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

Transmittal to  
SBA.

"(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

Notice.

"(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

"(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

5 USC 603.

**"§ 603. Initial regulatory flexibility analysis**

Public comment.  
5 USC 553.

"(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.

Publication in  
Federal  
Register.  
Transmittal to  
SBA.

"(b) Each initial regulatory flexibility analysis required under this section shall contain—

"(1) a description of the reasons why action by the agency is being considered;

"(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

"(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

"(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

"(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

"(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

"(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

"(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

"(3) the use of performance rather than design standards; and

"(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

**"§ 604. Final regulatory flexibility analysis**

5 USC 604.

"(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

5 USC 553

"(1) a succinct statement of the need for, and the objectives of, the rule;

"(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

"(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

"(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register at the time of publication of the final rule under section 553 of this title a statement describing how the public may obtain such copies.

Public  
availability;  
publication in  
Federal  
Register  
5 USC 553

**"§ 605. Avoidance of duplicative or unnecessary analyses**

5 USC 605

"(a) Any Federal agency may perform the analyses required by sections 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

Certification,  
publication in  
Federal Register  
and transmittal  
to SBA

"(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

"(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

5 USC 606.

#### "§ 606. Effect on other law

"The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

5 USC 607.

#### "§ 607. Preparation of analyses

"In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

5 USC 608.

Publication in  
Federal  
Register.

#### "§ 608. Procedure for waiver or delay of completion

"(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

Publication in  
Federal  
Register.

"(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.

5 USC 609.

#### "§ 609. Procedures for gathering comments

"When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through techniques such as—

"(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

"(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

"(3) the direct notification of interested small entities;

"(4) the conduct of open conferences or public hearings concerning the rule for small entities; and

"(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

#### "§ 610. Periodic review of rules

"(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

5 USC 610.

Plan, publication  
in Federal  
Register.

"(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

Consideration  
factors.

"(1) the continued need for the rule;

"(2) the nature of complaints or comments received concerning the rule from the public;

"(3) the complexity of the rule;

"(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

"(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

"(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

Publication in  
Federal  
Register.

#### "§ 611. Judicial review

5 USC 611.

"(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provi-

sions of this chapter to any action of the agency shall not be subject to judicial review.

"(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

"(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

#### "§ 612. Reports and intervention rights

"(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

"(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities.

"(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b)."

#### EFFECTIVE DATE

Sec. 4. The provisions of this Act shall take effect January 1, 1981, except that the requirements of sections 603 and 604 of title 5, United States Code (as added by section 3 of this Act) shall apply only to rules for which a notice of proposed rulemaking is issued on or after January 1, 1981.

Approved September 19, 1980.

#### LEGISLATIVE HISTORY:

SENATE REPORT No. 96-878 (Comm. on the Judiciary).  
CONGRESSIONAL RECORD, Vol. 125 (1980):

Aug. 6, considered and passed Senate.

Sept. 8, 9, considered and passed House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 16, No. 38:

Sept. 19, Presidential statement

Submittal to  
President and  
congressional  
committees.  
5 USC 612.

5 USC 601 note.

## Subtitle D—Regulatory Flexibility Act Amendments

### SEC. 241. REGULATORY FLEXIBILITY ANALYSES.

#### (a) INITIAL REGULATORY FLEXIBILITY ANALYSIS.—

(1) SECTION 603.—Section 603(a) of title 5, United States Code, is amended—

(A) by inserting after “proposed rule”, the phrase “, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States”; and

(B) by inserting at the end of the subsection, the following new sentence: “In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement.”

(2) SECTION 601.—Section 601 of title 5, United States Code, is amended by striking “and” at the end of paragraph (5), by striking the period at the end of paragraph (6) and inserting “; and”, and by adding at the end the following:

“(7) the term ‘collection of information’—

“(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either—

“(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, 10 or more persons, other than agencies, instrumentalities, or employees of the United States; or

“(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes; and

“(B) shall not include a collection of information described under section 3518(c)(1) of title 44, United States Code.

“(8) RECORDKEEPING REQUIREMENT.—The term ‘recordkeeping requirement’ means a requirement imposed by an agency on persons to maintain specified records.”

(b) FINAL REGULATORY FLEXIBILITY ANALYSIS.—Section 604 of title 5, United States Code, is amended—

(1) In subsection (a) to read as follows:

“(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue

laws of the United States as described in section 603(a), the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

“(1) a succinct statement of the need for, and objectives of, the rule;

“(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

“(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

“(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

“(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”; and

(2) in subsection (b), by striking “at the time” and all that follows and inserting “such analysis or a summary thereof.”

### SEC. 242. JUDICIAL REVIEW.

Section 611 of title 5, United States Code, is amended to read as follows:

#### “§ 611. Judicial review

“(a)(1) For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

“(2) Each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604.

“(3)(A) A small entity may seek such review during the period beginning on the date of final agency action and ending one year later, except that where a provision of law requires that an action challenging a final agency action be commenced before the expiration of one year, such lesser period shall apply to an action for judicial review under this section.

“(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b) of

this chapter, an action for judicial review under this section shall be filed not later than—

"(i) one year after the date the analysis is made available to the public, or

"(ii) where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period, the number of days specified in such provision of law that is after the date the analysis is made available to the public.

"(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to—

"(A) remanding the rule to the agency, and

"(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

"(5) Nothing in this subsection shall be construed to limit the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law or to grant any other relief in addition to the requirements of this section.

"(b) In an action for the judicial review of a rule, the regulatory flexibility analysis for such rule, including an analysis prepared or corrected pursuant to paragraph (a)(4), shall constitute part of the entire record of agency action in connection with such review.

"(c) Compliance or noncompliance by an agency with the provisions of this chapter shall be subject to judicial review only in accordance with this section.

"(d) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise permitted by law."

#### SEC. 243. TECHNICAL AND CONFORMING AMENDMENTS.

(a) Section 605(h) of title 5, United States Code, is amended to read as follows:

"(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification. The agency shall provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration."

(b) Section 612 of title 5, United States Code, is amended—

(1) in subsection (a), by striking "the committees on the Judiciary of the Senate and the House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives" and inserting "the Committees on the Judiciary and Small Business of the Senate and House of Representatives".

(2) in subsection (b), by striking "his views with respect to the" and inserting in lieu thereof, "his or her views with respect to compliance with this chapter, the adequacy of the rulemaking record with respect to small entities and the".

#### SEC. 244. SMALL BUSINESS ADVOCACY REVIEW PANELS.

(a) SMALL BUSINESS OUTREACH AND INTERAGENCY COORDINATION.— Section 609 of title 5, United States Code, is amended—

(1) before "techniques," by inserting "the reasonable use of";

(2) in paragraph (4), after "entities" by inserting "including soliciting and receiving comments over computer networks";

(3) by designating the current text as subsection (a); and

(4) by adding the following:

"(b) Prior to publication of an initial regulatory flexibility analysis which a covered agency is required to conduct by this chapter—

"(1) a covered agency shall notify the Chief Counsel for Advocacy of the Small Business Administration and provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that might be affected;

"(2) not later than 15 days after the date of receipt of the materials described in paragraph (1), the Chief Counsel shall identify individuals representative of affected small entities for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule;

"(3) the agency shall convene a review panel for such rule consisting wholly of full time Federal employees of the office within the agency responsible for carrying out the proposed rule, the Office of Information and Regulatory Affairs within the Office of Management and Budget, and the Chief Counsel;

"(4) the panel shall review any material the agency has prepared in connection with this chapter, including any draft proposed rule, collect advice and recommendations of each individual small entity representative identified by the agency after consultation with the Chief Counsel, on issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c);

"(5) not later than 60 days after the date a covered agency convenes a review panel pursuant to paragraph (3), the review panel shall report on the comments of the small entity representatives and its findings as to issues related to subsections 603(b), paragraphs (3), (4) and (5) and 603(c), provided that such report shall be made public as part of the rulemaking record; and

"(6) where appropriate, the agency shall modify the proposed rule, the initial regulatory flexibility analysis or the decision on whether an initial regulatory flexibility analysis is required.

"(c) An agency may in its discretion apply subsection (b) to rules that the agency intends to certify under subsection 605(b), but the agency believes may have a greater than de minimis impact on a substantial number of small entities.

"(d) For purposes of this section, the term 'covered agency' means the Environmental Protection Agency and the Occupational Safety and Health Administration of the Department of Labor.

"(e) The Chief Counsel for Advocacy, in consultation with the individuals identified in subsection (b)(2), and with the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget, may waive the requirements of subsections (b)(3), (b)(4), and (b)(5) by including in the rulemaking



record a written finding, with reasons therefor, that those requirements would not advance the effective participation of small entities in the rulemaking process. For purposes of this subsection, the factors to be considered in making such a finding are as follows:

"(1) In developing a proposed rule, the extent to which the covered agency consulted with individuals representative of affected small entities with respect to the potential impacts of the rule and took such concerns into consideration.

"(2) Special circumstances requiring prompt issuance of the rule.

"(3) Whether the requirements of subsection (b) would provide the individuals identified in subsection (b)(2) with a competitive advantage relative to other small entities."

5 USC 609 note.

(b) **SMALL BUSINESS ADVOCACY CHAIRPERSONS.**—Not later than 30 days after the date of enactment of this Act, the head of each covered agency that has conducted a final regulatory flexibility analysis shall designate a small business advocacy chairperson using existing personnel to the extent possible, to be responsible for implementing this section and to act as permanent chair of the agency's review panels established pursuant to this section.

5 USC 601 note.

**SEC. 245. EFFECTIVE DATE.**

This subtitle shall become effective on the expiration of 90 days after the date of enactment of this subtitle, except that such amendments shall not apply to interpretative rules for which a notice of proposed rulemaking was published prior to the date of enactment.